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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1400

THE FIRST NATIONAL BANK OF WAUKEGAN AS TRUSTEE UNDER TRUST No. 616, JOSEPH J. DROBNICK AND MARK J. DROBNICK,

Petitioners.

vs.

FOSS PARK DISTRICT, A BODY CORPORATE AND POLITIC,

Respondent-Condemnor.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The Respondent, Foss Park District, urges that the Petition for Writ of Certiorari be denied for the reasons hereinafter set forth.

I.

JURISDICTION OF THIS COURT.

Petitioner invokes the jurisdiction of this court upon the basis of 28 U. S. C. A. 1331. This provision of law has no application to the jurisdiction of the Supreme Court of the United States and relates only to the original jurisdiction of the District Courts. This court should not take jurisdiction of this matter under the provisions of Rule 19(a) for the reason that no federal question of substance has been decided in the state court and for additional

reasons arising out of the nature of the case, status of Petitioners, condition of the record, and nature of the remedy.

II.

NATURE OF THE CASE.

This litigation arose as a routine eminent domain proceeding whereby Foss Park District, a municipal corporation organized under the law of Illinois, sought to condemn certain real estate owned by Petitioners for the purpose of providing park facilities to be developed as a golf course. Among the questions raised by the traverse filed by Petitioners was:

> "That the statute purporting to authorize the establishment of a golf course and paying for the same out of public funds is an unconstitutional exercise of the legislative power in that said statute, in permitting fees to be charged for the use of public facilities, deprives taxpayers of the free and equal use of such facilities, thereby depriving them of property without due process of law and depriving them of equal protection of the laws under the State and U. S. Constitution."

There were no allegations or proof in the Trial Court that Petitioners were taxpayers within the Foss Park District; that they were persons who did or did not wish to play the game of golf; that any fee schedule had been established by Foss Park District as a condition of playing golf; or that the financial resources of Petitioners were such that they would have been unable to pay a reasonable fee for playing the game of golf.

The Trial Court struck the allegation challenging the constitutionality of the statute under which the Park District was exercising the power of eminent domain. The Appellate Court of the State of Illinois made the express

determination that the constitutional questions raised by Petitioners were not substantial. (Petition, p. 6a) While the Civil Appeals Rules of the Supreme Court of Illinois require that "Appeals from the final judgment of Circuit Courts shall be taken directly to the Supreme Court . . . (2) in cases involving a question of arising under the Constitution of the United States or of this state, . . ." Petitioners chose to take their appeal to the Appellate Court of Illinois, 2d District, which indicates initially that Petitioners themselves did not regard the constitutional question which they raised as one of substance. The Appellate Court in Illinois does not have jurisdiction to decide constitutional questions unless they involve "principles which are no longer fairly debatable, and consequently, not susceptible of being parlayed into substantial constitutional questions." *First National Bank and Trust Company* v. *City of Evanston,* 30 Ill. 2d 479, 197 N. E. 2d 705, *Pettigrew* v. *National Accounts System, Inc.,* 67 Ill. App. 2d 344.

The Supreme Court of Illinois apparently agreed with the Appellate Court that no substantial constitutional question was involved under either the Constitution of Illinois or of the United States for it declined to exercise its discretionary jurisdiction in this matter. In making this determination the Supreme Court of Illinois follows the same criteria as the Supreme Court of the United States. In *First National Bank and Trust Company* v. *Evanston,* 30 Ill. 2d 479, the Supreme Court of Illinois stated:

> "In view of the clear purpose of the new judicial article to curtail the mandatory jurisdiction of this court upon direct appeal, the interpretation that has been applied by the Supreme Court of the United States to the phrase in the exercise of its appellate jurisdiction is, however, relevant. That court has developed the concept of a 'substantial' constitutional question as a criterion of its jurisdiction under this phrase."

III.

ADDITIONAL REASONS FOR DENYING CERTIORARI.

1. The Status of Petitioners.

Petitioners are before the court as landowners in an eminent domain proceeding objecting to the constitutionality of Chapter 105 of Ill. Rev. Stats., 1969, apparently in two capacities (a) as taxpayers and (b) as guardians of unidentified persons composing a class which they characterize as the "low working class" (p. 6 of Petition) who might not be able to play the game of golf because the statute contemplates that fees might be charged for the use of the public golf course. At the outset we point out that these two positions are basically inconsistent in that insofar as the cost of the acquisition, operation and maintenance of the golf course is discharged by a fee paid by the users then Petitioners as taxpayers would be benefited rather than harmed. On the other hand, insofar as Petitioners seeks to protect the interests of the "low working class" who might be unable to pay the fee then this particular class is assisted or aided to the extent that taxpayers defray a part of the cost of acquiring, operating or maintaining of the facilities.

We point out that nothing in the allegations in the pleadings or in the evidence in the record indicates that Petitioners are members of either class whose protection they have undertaken. If the land which they hold in the Park District is condemned and they no longer own it then such land is no longer taxable in their hands and therefore they can not be adversely affected by taxes levied in the Park District to pay for the costs of acquiring, operating or maintaining the golf course. There are no allegations and is no evidence in the record that Petitioners own any land or are residents of or pay any taxes levied by Foss Park District.

Certainly there are no allegations or evidence that Petitioners are members of a "low working class" who can not afford to pay any kind of a fee (of which there is no evidence) which might be imposed for the use of the facilities. It is obvious that Petitioner, The First National Bank of Waukegan as Trustee under Trust Number 616, is neither indigent nor a golf player. The record does not show whether either Joseph Drobnick or Mark Drobnick are golf players and it certainly does not show anything with respect to their financial disability to pay a reasonable fee for a public service. The fact is that this record indicates that they received a judgment in their favor in the amount of $75,202 for their land. This would seem to militate against the conclusion that they were members of the "low working class" and could not afford to pay a fee to play golf.

It is well established that before a party may complain of the denial of the equal protection of the laws or that he has been denied due process of law he must bring himself within the injured class or make some showing that such a denial has affected him. (*U. S.* v. *Raines*, 362 U. S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519).

2. This Matter Is Not in a Posture for Decision of Question Presented.

As previously pointed out there is nothing in this record to inform this court with respect to the factors relating to the general use of public golf course, the fees which are charged for such use and the nature of the need of such facilities in the community and the type of use made of such facilities. Even assuming that the question raised is of sufficient significance to require the attention of this court the nature of this litigation and the record before this court is wholly inadequate for any kind of a determination to be made.

3. Nature of Remedy.

Even assuming that Petitioners were the proper parties to raise the due process and equal protection question and that the record was in such a condition that a reasoned and informed decision could be rendered with respect to such issues it would appear obvious that the remedy for the problem would be of no avail to these Petitioners. Even if it is for some reason or another deemed to be a denial of equal protection to charge any citizen a fee for the use of a public facility when he does not have sufficient money to pay, the proper remedy is not to deny a park district the power to acquire land for such purpose but rather it is to make some special arrangement or some modification of the fee schedule which would result in a special consideration for such class of people. Thus in *Griffin* v. *Illinois,* relied upon by Petitioners, the Supreme Court did not hold that the statutory proceedings for the review of criminal convictions in Illinois was unconstitutional but rather simply held that the State of Illinois must find in some manner, through court rule or otherwise, a means of providing a transcript for indigent criminal defendants. Consequently, even if the full force of Petitioners' position was granted the net result would be that certain classes of people might be allowed to play golf on the public course without the payment of a fee and it would not constitute a defense in this eminent domain proceeding.

The United States Supreme Court determined long ago that it was an appropriate public purpose to condemn land to provide parks. In *Via* v. *State Commission on Conservation, etc.,* 9 F. Supp. 556 affirmed 80 L. Ed. 388, the Trial Court held when the power of the State of Virginia was challenged in a condemnation proceeding initiated for the purpose of the establishment of Shenandoah National Park,

> ". . . that the power exists in any state for the promotion of the safety, convenience, welfare, and happiness of the people of that state. Conceding that the power of eminent domain must be exercised by a state only in connection with some public function of that state it must also be conceded that the furtherance of the health, pleasure and recreational facilities of its people is a function of the state."

Recreation of the citizenry is thus a legitimate aim of the state and the state in pursuing this aim caters to many diverse tastes: fishing, camping, mountain climbing, golf, tennis, swimming, bird watching, sailing, picnicking, etc. On occasion some or all of the costs of the furnishing of these activities are defrayed by the payment of a user's fee by any individual who shall avail himself of these benefits.

In none of these areas is anyone wholly excluded from recreation as such by reason of an inability to pay a fee in the same manner as they would be excluded from a vital public service as in *Boddie* v. *State of Connecticut* (No. 27, Oct. Term, 39 U. S. L. W. 4294), (access to a court which had a monopoly of the dissolution of the marriage relationship), *Griffin* v. *People,* 351 U. S. 12, 76 S. Ct. 585 (ability to participate in a state provided procedure to obtain review of a death sentence), or *Harper* v. *State Board of Elections,* 38 U. S. 663, 86 S. Ct. 1079 (ability to exercise the franchise).

Not only has the Supreme Court approved the condemnation of land by the State for recreational use but it has also approved the charging of fees for the use of publicly acquired or constructed and publicly maintained facilities. In *Huse* v. *Glover,* 119 U. S. 487, 30 L. Ed. 543 (1886) the Supreme Court sustained the power of the State of Illinois to construct locks and dams in the Illinois River for the purpose of improving its navigation and to prescribe reasonable rates of toll for passage of vessels through the locks. Counsel in that case did not have the ingenuity to urge that the tolls violated the equal protection clause because one

navigator might be less affluent than another navigator but his contention that the charging of tolls violated a provision of the Northwest Ordinance that "the navigable waters leading into the Mississippi . . . shall be common highways and forever free" was denied upon the grounds that such provision related only to the water ways in their natural condition.

Subsequent to *Huse* v. *Glover,* the U. S. Supreme Court decided *Sands* v. *Manistee River Improvement Co.,* 123 U. S. 288, 31 L. Ed. 149 and held that it was not a denial of due process for the State of Michigan to require that tolls be paid for the use of an improved waterway stating:

> "There is no taking of property from him, by such exaction within the prohibition, any more than there is a taking of property from a traveler, in requiring him to pay for his lodgings in a public inn. There is in such a transaction only an exchange of money for its supposed equivalent. The tolls exacted from the defendant and are merely compensation for benefits conferred, by which the floating of his logs down the stream was facilitated."

Similar conclusions were reached by the Supreme Court of Illinois with respect to fees charged by a city for the use of showers, dressing rooms, and lockers (*Carstens* v. *City of Wood River,* 344 Ill. 319, 176 N. E. 266) and a charge by the park district for mooring a yacht (*MacNeil* v. *Chicago Park District,* 401 Ill. 556, 82 N. E. 2d 452).

Petitioners, in accordance with long established procedures in eminent domain proceedings, have received a *quid pro quo* for the taking of their land for a purpose recognized long ago as legitimate by the Supreme Court of the United States. The proposed facilities are open to all without discrimination or classification by the State of Illinois or any state agency.

In *Boddie* v. *State of Connecticut* (Number 27, October Term, 1970, 39 L. W. 4294), this court expanded to some

extent upon the rationale of the *Griffin* case. Justice Douglas in warning and concurring, raised some question as how far the court might go. He stated:

> "The court today puts 'flesh' upon the due process clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. Fishing may be equally important to some communities. May an indigent be excluded if he does not obtain a license that requires payment of money which he does not have?"

There may be some resemblance between a fishing license case and a golf course case. We believe that this court has already decided by its reasoning as expressed in the *Boddie* case, in the *Griffin* case and in *Cohen* v. *Beneficial Finance Corp.*, 337 U. S. 541, 93 L. Ed. 1528, that the due process and equal protection clauses do not require that a public service for which a fee may be charged is required to be freely given to indigents unless such service relates to matters that are "of the very essence of a scheme of ordered liberty," and therefore this court should not take jurisdiction of every case where an even-handed statute encounters the existence of unequal external circumstances.

Respectfully submitted,

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